Privy Council Appeal No. 45 *of* 1955

Kalikutty Kanapathipillai - - - - - - - - *Appellant*

v.

Velupillai Parpathy - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1956

Present at the Hearing:

VISCOUNT SIMONDS
LORD RADCLIFFE
LORD TUCKER
LORD COHEN
MR. L. M. D. DE SILVA

[*Delivered by* LORD TUCKER]

This appeal concerns a judgment of the Magistrate's Court of Batticaloa in Ceylon dated 31st January, 1951, whereby it was adjudged that the appellant was the father of an illegitimate child born to the respondent on 24th May, 1950, and ordered that he should pay the respondent Rs.30 a month for its maintenance.

The appellant lodged a petition of appeal from this judgment with the Supreme Court on 19th February, 1951, but his appeal was subsequently rejected by the Supreme Court as incompetent on the ground that the petition had been lodged out of time.

The present appeal, at the hearing of which the respondent was not represented, comes before the Board pursuant to special leave granted by Her Majesty in Council on 22nd February, 1952. It involves the meaning of the word "access" in a provision of section 112 of the Evidence Ordinance of Ceylon, with regard to which there has been over the years a considerable divergence of opinion in the Supreme Court of Ceylon.

The provision reads as follows:—

> "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that that man had no access to the mother at any time when such person could have been begotten or that he was impotent."

The respondent brought proceedings under the Maintenance Ordinance against the appellant in respect of a child born to her on 24th May, 1950.

The relevant facts are as follows:—

The respondent was married about nine years before the hearing to one Mylvaganam. He left her after a few years—whether 2 or 4 is not clear—and went to live with another woman at a village called Annamalai some 3 or 4 miles from Kallar where the respondent was living at all material times. For 5 or 7 years before the hearing the respondent and her husband had been living apart and during this time three children were born to Mylvaganam's mistress.

It is not now contended that there are any grounds for disturbing the findings of the Magistrate that the appellant and respondent had sexual intercourse in August, 1949, and that such intercourse resulted in the birth of the child on 24th May, 1950, unless the appellant can invoke the provisions of section 112 of the Evidence Ordinance set out above. It is accordingly unnecessary to refer to the evidence upon which the Magistrate based his decision on the issue of sexual intercourse between the appellant and the respondent.

For present purposes it can be taken that the only relevant facts are (1) that in August, 1950, the respondent was living at Kallar where she had sexual intercourse with the appellant in his house in which she was residing with him and his wife and daughter; (2) that at this time Mylvaganam was living with his mistress and children at Annamalai some 3 or 4 miles distant. To these facts must be added the uncontradicted evidence of the respondent, accepted by the Magistrate, that she had never seen her husband from the time he left her.

The question is whether as a matter of law, as the Magistrate held, these facts warrant a finding of no access. It was submitted by counsel for the appellant that "access" in this section means opportunity for intercourse in the geographical sense that it was physically possible for the parties at the relevant time to have had sexual intercourse if they had so desired and consequently that in order to prove non-access impossibility of the creation of such opportunity must be established.

In 1923 this question was considered in Ceylon by a full Bench in the case of *Jane Nona* v. *Leo* (1923) 25 N.L.R. 241, where a previous decision in the case of *Sopi Nona* v. *Marsiyan* (1903) 6 N.L.R. 379, was overruled and it was held that "access" means "actual intercourse". Subsequently in 1946, Howard C.J., in *Ranasinghe* v. *Sirimanna*, 47 N.L.R. 112, held that in view of the decision of the Privy Council in *Karapaya Servai* v. *Mayandi*, A.I.R. (1934), P.C. 49, on the corresponding section of the Indian Evidence Act (which is in identical language save for the omission of the words "or that he was impotent"). *Jane Nona's* case could no longer be considered as binding on him, and that "access" should be interpreted as meaning "possibility" or "opportunity" of intercourse. This decision was followed in *Selliah* v. *Sinnammah* (1947) 48 N.L.R. 261.

In 1948, however, Basnayake, J., in *Pesona* v. *Babonchi Baas*, 49 N.L.R. 442, and in 1950 Swan J., in *Kiri Banda* v. *Hemasinghe*, 52 N.L.R. 69, considering the Privy Council decision on an Indian Act not binding on them, felt themselves free to revert to and follow the full Bench decision in *Jane Nona* (*supra*).

In this state of the authorities their Lordships consider it is desirable that they should endeavour to state what is in their view the true meaning to be given to this word in the context in which it appears in this Ordinance. They are of opinion that the language of this section, though not purporting or intended to reproduce exactly the English law on this subject, was clearly influenced by the English legal outlook on the subject matter as disclosed in the authorities in the course of years in which the word "access" so frequently appears.

It is true that the word has not in every case been used in precisely the same sense, but perhaps for present purposes the passage which is most helpful is the one referred to by Basnayake, J., in the case of *Pesona* v. *Babonchi Baas* (*supra*) at page 455, where he quotes the words used by Lord Eldon in *Head* v. *Head* (1823) Turn. L.R. at 140, with reference to the opinion of the Judges in the Banbury Peerage Case. It runs as follows:—

> "I take them to have laid down, so as to give it all the weight which will necessarily travel along with their opinion, although not a judicial decision, that where access according to the laws of nature, by which they mean, as I understand them, sexual intercourse, has taken place between husband and wife, the child must be taken to

be the child of the married person, the husband, unless on the contrary it be proved that it cannot be the child of that person. Having stated that rule, they go on to apply themselves to the rule of law where there is personal access, as contradistinguished from sexual intercourse, and on that subject I understand them to have said, that where there is personal access, under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and that that presumption must stand, till it is repelled satisfactorily by evidence that there was not such sexual intercourse."

Their Lordships are of opinion that the significance of the words " no access " in section 112 of the Evidence Ordinance is not fully conveyed by assigning a precise verbal definition to the word " access " itself. They are satisfied that a test which considers merely the bare geographical possibility of the parties reaching each other during the relevant period must be rejected completely. Taken at its face value such a test could hardly ever exempt a husband from the onus of paternity and could work real injustice in many cases. Again, their Lordships are of opinion that " no access " would be established in any case in which, on the evidence available, it was right to conclude that at no time during the period had there been " personal access " of husband to wife in the sense given to that phrase in the passage from Lord Eldon's judgment which has been quoted above. On the other hand, if the evidence in a case did disclose that at any time during the period there had been such personal access—and it must be remembered that the section may often have to be applied when there has been no separation between the married pair—then " no access " would not be established unless the presumption that sexual intercourse had in fact resulted were rebutted by evidence that displaced the presumption. It is only necessary to add that, though the presumption arising from personal access is, as has been said, a rebuttable one, it is in the nature of things that nothing less than cogent evidence ought to be relied on for this purpose.

Applying this test to the facts as found by the Magistrate it is clear that the absence of such personal contact as would give rise to the presumption of sexual intercourse was established and his order consequently justified. His finding would equally be unassailable if non-access required positive proof of no actual sexual intercourse.

Their Lordships do not consider that this decision in any way conflicts with the judgment of the Board in *Karapaya* v. *Mayandi* (1934) A.I.R. (P.C.) 49, where the finding that the appellants had failed to establish non-access at the material date, December, 1911, could be justified on either view of the meaning of the word access. It is true that in delivering the judgment of the Board, Sir George Lowndes said: " It was suggested by counsel for the appellants that ' access ' in the section implied actual cohabitation, and a case from the Madras reports was cited in support of this contention. Nothing seems to turn upon the nature of the access in the present case, but their Lordships are satisfied that the word means no more than opportunity of intercourse."

This shows that their expression of opinion was purely obiter. Moreover the judgment does not define precisely what is meant by " opportunity of intercourse " and certainly lends no support to the appellant's test of bare geographical possibility.

As was said in the judgment of the Board in the recent case of *Alles* v. *Alles* (1950) 51 N.L.R. 416 at 418:—" The issue remains whether on the whole of the evidence made available it can safely be concluded that there was no access at a time when the child could have been conceived."

In the present case their Lordships are of opinion that the conclusion of " no access " was one which it was safe and proper for the Magistrate to draw and they will accordingly humbly advise Her Majesty that this appeal should be dismissed.

(39784) Wt. 8069—3 90 8/56 D.L.

In the Privy Council

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VELUPILLAI PARPATHY

DELIVERED BY LORD TUCKER

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1956